Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03–3 OF 2001
STEVE SHIM CJ (SABAH AND SARAWAK), ABDUL HAMID MOHAMAD AND MOHD NOOR AHMAD FCJJ
18 MAY 2004

Bankruptcy — Interest — Interest on debts — Arrears of interest — Whether arrears of interest may only be claimed for six years from date of judgment — Whether s 6(3) of Limitation Act 1953 applies to bankruptcy proceedings

Limitation — Enforcement of judgment — Bankruptcy notice issued — Arrears of interest — Whether arrears of interest may only be claimed for six years from date of judgment — Whether s 6(3) of Limitation Act 1953 applies to bankruptcy proceedings

The judgment creditor obtained judgment against the judgment debtor on 23 October 1987. On 28 March 1996, the judgment creditor took out a bankruptcy notice ('BN') and served it on the judgment debtor on 3 June 1996. The judgment debtor served on the judgment creditor a notice under s 3(2)(ii) of the Bankruptcy Act 1967 ('BA') alleging that the BN was incorrect and excessive. The senior assistant registrar dismissed the judgment debtor's s 3(2)(ii) notice. At the hearing of the appeal before the High Court judge, the judgment debtor's counsel orally raised a preliminary objection that the sum demanded in the BN was wrong as it included a statute-barred debt. The High Court judge dismissed the judgment debtor's preliminary objection. The Court of Appeal allowed the judgment debtor's appeal. The judgment creditor applied for leave to appeal to this court against the decision of the Court of Appeal. This court granted leave to appeal on the following questions: (a) whether the second limb of s 6(3) of the Limitation Act 1953 ('the Act') was relevant and applicable to bankruptcy proceedings ('first question'); and (b) whether the BN was valid under s 3(2)(ii) of the BA if the judgment debtor did not dispute that the claim stated in the BN was excessive within seven days from the date of service of the BN ('second question'). Section 6(3) of the Act states that 'an action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date of which the interest became due'. The second question, which was not raised in the High Court, was raised by the judgment creditor in the Court of Appeal. The Court of Appeal held that it was too late for the judgment creditor to raise the objection.

Held, dismissing the appeal:

(1) In answering the first question, it was necessary to consider: (a) whether a bankruptcy proceeding was an 'action' within the meaning of s 6(3) of the Act as defined in s 2 of the Act; and (b) whether the two limbs of s 6(3) of the Act should be read disjunctively or conjunctively (see para 48).

(2) By merely looking at the word 'action' in s 6(3) of the Act, it appeared that the word 'action' did not include a bankruptcy proceeding. It was

also not a 'suit', which was one of the words used in the definition of 'action' in s 2 of the Act. However, a bankruptcy proceeding was a proceeding in a court of law which was based upon a judgment. There had to be a judgment before a bankruptcy proceeding can be commenced. Then, going by the definition of 'action' in s 2, a bankruptcy proceeding was an action and an action upon a judgment. As such, a bankruptcy proceeding was caught by the provisions of s 6(3) of the Act (see paras 50, 51 and 53). *WT Lamb & Sons v Rider* [1948] 2 KB 331, *Lowsley v Forbes* [1998] 3 WLR 50 distinguished.

(3) Section 6(3) of the Act is a one-sentence sub-section and must be read together. As such, it was misleading to refer to s 6(3) of the Act as 'first limb' and 'second' limb and thereby giving the impression that they were to be read separately. Under the Act, the limitation of action is six years. The provision is silent on the limitation period for claiming arrears of interest because it is automatically limited to six years. Therefore, where the limitation is action is 12 years as in ss 21 and 6(3) of the Act, the limitation period for claiming arrears of interest is six years (see paras 56, 57 and 58).

(4) Accordingly, the first question was answered in the affirmative, namely, s 6(3) of the Act applied to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment (see para 61).

(5) In the instant case, the judgment was obtained on 23 October 1987. Even though interest was calculated from 1 December 1985, it merged into the judgment debt and therefore, the date the interest became due was the date of the judgment and not the earlier date. The BN was filed eight years and five months from the date of judgment and as such was not out of time. However, the arrears of interest may only be claimed for a period of six years from the date of the judgment. Since the arrears of interest claimed contained arrears of interest outside the six-year period, the BN was invalid (see paras 62, 66 and 69).

(6) The second question should not be answered as this court did not have the advantage of having the judgments of the High Court and the Court of Appeal on this issue (see para 75)

[Bahasa Malaysia summary

Pemiutang penghakiman mendapat penghakiman terhadap penghutang penghakiman pada 23 Oktober 1987. Pada 28 Mac 1996, pemiutang penghakiman mengeluarkan notis kebankrapan ('NK') dan menyampaikannya kepada penghutang penghakiman pada 3 Jun 1996. Penghutang penghakiman menyampaikan kepada pemiutang penghakiman satu notis di bawah s3(2)(ii) Akta Kebankrapan 1967 ('AK') mengatakan bahawa NK tidak betul dan berlebihan. Penolong kanan pendaftar menolak notis s 3(2)(ii) penghutang penghakiman penghutang. Semasa rayuan di hadapan hakim Mahkamah Tinggi, peguam penghutang penghakiman secara lisan telah membangkitkan

bantahan awal bahawa jumlah yang dituntut di dalam NK adalah salah kerana telah memasukkan hutang dihalang oleh statut had masa. Hakim Mahkamah Tinggi menolak bantahan awal penghutang penghakiman. Mahkamah Rayuan membenarkan rayuan penghutang penghakiman. Pemiutang penghakiman memohon kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan. Mahkamah ini memberikan kebenaran untuk merayu atas soalan-soalan berikut: (a) sama ada cabang kedua s 6(3) Akta Had Masa 1953 ('Akta itu') relevan dan boleh dipakai untuk prosiding kebankrapan ('soalan pertama'); dan (b) sama ada NK sah di bawah s 3(2)(ii) AK jika penghutang penghakiman tidak mempertikaikan bahawa tuntutan di NK adalah berlebihan dalam lingkungan tujuh hari daripada tarikh penyampaian NK ('soalan kedua'). Seksyen 6(3) Akta itu menyebut bahawa 'an action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date of which the interest became due'. Soalan kedua, yang tidak dibangkitkan di Mahkamah Tinggi, dibangkitkan oleh pemiutang penghakiman di Mahkamah Rayuan. Mahkamah Rayuan memutuskan bahawa sudah terlalu lewat untuk pemiutang penghakiman untuk membangkitkan bantahan.

Diputuskan, menolak rayuan:

(1) Dalam menjawab soalan pertama, perlu untuk membuat pertimbangan: (a) sama ada prosiding kebankrapan adalah satu 'action' di dalam lingkungan s 6(3) Akta itu seperti ditafsirkan dalam s 2 Akta itu; dan (b) sama ada dua cabang s 6(3) Akta itu harus dibaca berasingan atau bersama (lihat perenggan 48).

(2) Dengan hanya membaca perkataan 'action' dalam s 6(3) Akta itu, nampaknya bahawa perkataan 'action' tidak termasuk prosiding kebankrapan. Ia juga bukan 'suit', salah satu perkataan digunakan untuk mentafsirkan perkataan 'action' dalam s 2 Akta itu. Walau bagaimanapun, prosiding kebankrapan adalah satu prosiding di mahkamah berdasarkan satu penghakiman. Perlu ada satu penghakiman sebelum prosiding kebankrapan dimulakan. Berdasarkan definisi 'action' dalam s 2, prosiding kebankrapan adalah tindakan dan tindakan ke atas penghakiman. Oleh itu, prosiding kebankrapan tersekat oleh peruntukan s 6(3) Akta itu (lihat perenggan 50, 51 dan 53); *WT Lamb & Sons v Rider* [1948] 2 KB 331 dan *Lowsley and another v Forbes (t/a LE Design Services)* [1998] 3 WLR 501 dibeza.

(3) Seksyen 6(3) Akta itu adalah satu subseksyen dalam satu ayat dan mesti dibaca bersama. Oleh itu, ia amat mengelirukan untuk merujuk s 6(3) Akta itu sebagai 'first limb' dan 'second limb dan oleh itu, memberi tanggapan untuk dibaca berasingan. Di bawah Akta itu, had masa tindakan adalah enam tahun. Peruntukan itu tidak menyatakan apa-apa mengenai had masa untuk menuntut tunggakan faedah kerana secara automatik ia terhad kepada enam tahun. Oleh itu, di mana had masa tindakan adalah 12 tahun seperti di dalam ss 21 dan 6(3) Akta itu, had masa untuk menuntut tunggakan faedah adalah enam tahun (lihat perenggan 56, 57 dan 58).

(4) Sememangnya, soalan pertama dijawab mengiakan iaitu, s 6(3) Akta itu dipakai untuk prosiding kebankrapan dan sementara prosiding kebankrapan boleh dimulakan dalam masa 12 tahun daripada tarikh penghakiman, tunggakan faedah hanya dapat dituntut dalam masa enam tahun daripada tarikh penghakiman (lihat perenggan 61).

(5) Dalam kes ini, penghakiman diperolehi pada 23 Oktober 1987. Walaupun faedah dikira daripada 1 Disember 1985, ia bergabung dengan hutang penghakiman dan oleh itu, tarikh faedah boleh dibayar adalah tarikh penghakiman dan bukan tarikh yang lebih awal. NK itu difailkan lapan tahun dan lima bulan dari tarikh penghakiman dan oleh itu tidak berada di luar tempoh masa. Walau bagaimanapun tunggakan faedah hanya boleh dituntut dalam tempoh masa enam tahun daripada tarikh penghakiman. Memandangkan bahawa tunggakan faedah yang dituntut mengandungi tunggakan faedah di luar tempoh enam tahun, NK itu tidak sah (lihat perenggan 62, 66 dan 69).

(6) Soalan kedua tidak seharusnya dijawab kerana Mahkamah ini tidak mempunyai penghakiman Mahkamah Tinggi dan Mahkamah Rayuan mengenai isu ini (lihat perenggan 75).]

Notes

For cases on interest on debts, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2129.

For cases on bankruptcy notice issued (enforcement of judgments), see 9 *Mallal's Digest* (4th Ed 2002 Reissue) para 2197.

Cases referred to

Lim Ah Hee, Re; ex p Perwira Affin Bank Bhd [2000] 3 MLJ 211 (refd)

Lim Ah Hee @ Sim Ah Hee, Re; ex p Perwira Affin Bank Bhd [1997] MLJU 46 (refd)

Lowsley and another v Forbes (t/a LE Design Services) [1998] 3 WLR 501 (refd)

Malaysian Soil Investigation Sdn Bhd v Emko Holdings Sdn Bhd [1993] MLJU 412; [1994] 1 CLJ 267 (refd)

Moscow Narodny Bank Ltd v Ngan Ching Wen Federal Court Civil Appeal No 13-1 of 2003(W) (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385 (refd)

WT Lamb & Sons v Rider [1948] 2 KB 331 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(2)(ii)
Bankruptcy Rules 1969 rr 95, (2)
Limitation Act 1953 ss 2, 6, (1), (2), (3), (5), 21, 23
Limitation Act 1939 [Eng] ss 2(4)
Limitation Act 1980 [Eng] s 24, (1), (2)
Rules of the High Court 1980 O 46 rr 1, 2, (1)(a)
Rules of the Supreme Court [Eng] O 42 r 23(a)

Porres Royan (Dahlia WM Lee with him) (Shook Lin & Bok) for the appellant.
Karpal Singh (Karpal Singh & Co) for the respondent.

Abdul Hamid Mohamad FCJ (delivering judgment of the court):

[1] On 23 October 1987, the appellant (judgment creditor) obtained a judgment against the respondent (judgment debtor) for the sum of RM2,963,054.86 with interest thereon at the rate of 16.5%pa from 1December 1985 until the date of realisation.

[2] On 28 March 1996, the appellant took out a bankruptcy notice and served it on the respondent on 3 June 1996.

[3] On 7 June 1996 the respondent served on the appellant an 'affidavit on application to set aside bankruptcy notice' pursuant to r 95 of the Bankruptcy Rules 1969 claiming that the respondent had a counterclaim against the appellant which the respondent could not set up in the action in which the judgment was obtained.

[4] On 10 June 1996, the respondent served on the appellant a notice pursuant to s 3(2)(ii) of the Bankruptcy Act 1967 alleging that the bankruptcy notice was incorrect and excessive in that the sale of the respondent's shares and dividends on the shares had not been taken into account in the bankruptcy notice and that the appellant had not given a proper breakdown of the sales of the shares.

[5] The respondent filed affidavits in reply in relation to both the r 95 affidavit and the notice.

[6] On 19 March 1997 the senior assistant registrar dismissed the respondent's r 95 affidavit and the notice and pursuant to r 95(2) declared that the act of bankruptcy was committed on 19 March 1997.

[7] The respondent appealed to the judge in chambers.

[8] At the hearing of the appeal before the learned judge on 7 May 1995, the respondent, through a new solicitor orally raised two preliminary objections. The first was that the sum demanded in the bankruptcy notice was wrong as it included statute-barred interest and, secondly, that the respondent had not obtained prior leave of court under O 46 r 2(1)(a) of the Rules of the High Court 1980 ('RHC') before instituting bankruptcy proceedings. The second preliminary objection was later abandoned after the appellant produced the order granting the leave.

[9] On 9 July 1997 (within six months of the act of bankruptcy) the appellant filed its creditor's petition.

[10] On 19 August 1997 the first preliminary objection was dismissed by the learned judge.

[11] On 26 August 1997 the respondent filed an appeal to the Court of Appeal against the learned judge's decision on 19 August 1997 dismissing the first preliminary objection. The Court of Appeal allowed the respondent's appeal on 17 January 2000.

[12] The appellant filed a notice of motion applying for leave to appeal to this court against the decision of the Court of Appeal on 17 January 2000. This court granted leave to appeal to the appellant on 17 September 2001 on the following questions:

(i) whether the second limb of s 6(3) of the Limitation Act 1953 is relevant and applicable to bankruptcy proceedings; and

(ii) whether the impugned bankruptcy notice is valid under the provisions of s 3(2)(ii) of the Bankruptcy Act 1967 if the judgment debtor does not dispute that the claim stated in the bankruptcy notice is excessive within seven days from the date of service of the bankruptcy notice. (my own translation).

First Question

[13] On the first question, the learned judge held (see *Re Lim Ah Hee @ Sim Ah Hee, ex p Perwira Affin Bank Bhd* [1997] MLJU 46):

> The matter before me relates to bankruptcy action taken by the judgment creditor. In my view, going by the meaning of 'writ of execution' in O 46 r 1 of the Rules of the High Court 1980, bankruptcy actions do not come within the meaning of writ of execution and there may be no need even to get leave under O 6 r 2 to proceed with the bankruptcy actions. The issue of a bankruptcy notice is not a form of execution (see *Re A Bankruptcy Notice* (1898) 1 QB at p 387). (Page 764 of the *Supreme Court Practice* 1997, Vol 1).
>
> As seems clear to me that 'action' under s 6(3) of the Act does not cover execution proceedings and what more the bankruptcy actions, it follows therefore that the bankruptcy actions do not come within the ambit of s 6(3) of the Act and is therefore not applicable.
>
> As s 6(3) of the Act refers to 'actions on judgments' it would seem only sensible to interpret both limbs as applying in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions. In my view the bankruptcy actions just like execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action. In other words the bankruptcy actions do not operate on the concept of the cause of actions as is intended by the provisions of the Act.

[14] In the alternative, after referring to *Malaysian Soil Investigation Sdn Bhd v Emko Holdings Sdn Bhd* [1994] 1 CLJ 267 (High Court), the learned judge held:

> "Similarly here, the judgment debt became due on 23 October 1987 and the interest became due from 1 December 1985, a period of roughly one year and eleven months and it was therefore well within the limitation period. It follows that the Act does not prohibit the payment of arrears of interest due on a judgment debt beyond the six years after they become due so long as the act of recovery is made before the expiry of the six years period.
>
> I agree with the learned Judge's interpretation of section 6(3) of the Act and would in the circumstances rule that interest claimed is not statute barred and therefore the bankruptcy notice is not void ab initio as claimed by the counsel for the judgment debtor."

[15] Before going any further, perhaps I should summarise the ruling of the learned trial judge:

(1) bankruptcy actions do not come within the meaning of 'writ of execution' under O 46 r 1 of the RHC and there is no need to obtain leave pursuant to O 46 r 2 RHC to proceed with bankruptcy actions;

(2) 'actions' under s 6(3) of the Limitation Act 1953 does not cover execution proceedings and bankruptcy actions. Therefore, bankruptcy actions do not fall within the ambit of s 6(3) of the Limitation Act 1953 and therefore the provision of that section does not apply to bankruptcy actions;

(3) both limbs of s 6(3) of the Limitation Act 1953 apply in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions;

(4) in the alternative, s 6(3) of the Limitation Act 1953 does not prohibit the payment of arrears of interest on a judgment debt beyond the six years after they became due so long as the act of recovery is made before the expiry of the six year period.

[16] The Court of Appeal allowed the appeal. The Court of Appeal held at pp 215-216 (*Re Lim Ah Hee; ex p Perwira Affin Bank Bhd*[2000] 3 MLJ 211):

> In the present case we are of the opinion that counsel for the appellant was right when he submitted that the decision of *Lowsley* [*Lowsley & Anor v Forbes (t/a LE Design Services* [1998] 3 All ER 897] affected the decision of *WT Lamb* [*WT Lamb & Sons v Grand United Holdings Bhd* [1998] 5 MLJ 345] in that though there is no bar in the execution of a judgment after six years, the recovery of interest is limited to six years only. In view of this the decision of the learned Judge relying on the decision of *WT Lamb* cannot be upheld.
>
> From the authorities it is clear that the local courts had followed the decision of *Lowsley's* case in respect of limitation to interest. In *Wangsini Sdn Bhd v Grand United Holdings Bhd* [1998] 5 MLJ 345, it was held that s 6(3) of the Limitation Act 1953, will have a telling effect on the statutory notice of demand as the petitioner is only legally entitled to claim interest on the judgment in default obtained on 19January 1990 for six years from the date on which the interest became due. It is clear from this authority that a bankruptcy notice cannot claim interest exceeding six years on a judgment obtained. It is also clear that a claim for interest exceeding six years will nullify the bankruptcy notice.
>
> ...
>
> The learned judge made his ruling only in respect of the second limb whereby he decided that there is no limitation to interest claimed because of the decision in *WT Lamb*. Since *WT Lamb* had been overruled by *Lowsley's* case under the law as it is now, a judgment creditor can only claim interest on a judgment sum not exceeding six years from the date it is due. In the present case the respondent is only entitled to claim six years interest from the date of judgment.
>
> The present appeal is only in respect of the ruling made by the learned judge on limitation of interest to be claimed. We are not sure whether the bankruptcy notice included a claim of interest exceeding the limitation period. If it is so then the bankruptcy notice is void.

[17] Lest I get carried away, I should remind myself that I am only dealing with the issue whether the second limb of the Limitation Act 1953 is applicable to bankruptcy proceedings. The High Court in this case held it does not and the Court of Appeal held it does. The answer really lies in the interpretation of s 6(3) itself.

[18] Rather than merely reproducing s 6(3) what more only the so-called 'second limb', I think we should look at the whole scheme of the Act.

[19] Section 2 (Interpretation) defines 'action' as follows:

'action' includes a suit *or any other proceeding* in a court of law; (Emphasis added.)

[20] Almost all the sections that follow talk about actions of all types imaginable. Section 6 itself contains a heading 'Actions of Contract and Tort and Certain Other Actions' and provides:

6 (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —

(a) actions founded on a contract or on tort;

(b) actions to enforce a recognisance;

(c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

(2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

(3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

(4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:

Provided that for the purpose of this subsection the expression 'penalty' shall not include a fine to which a person is liable on conviction for a criminal offence.

(5) Nothing in this section shall apply to —

(a) any cause of action within the Admiralty jurisdiction of the High Court which is enforceable *in rem* other than an action to recover the wages of seamen, or

(b) any action to recover money secured by any mortgage of or charge on land or personal property.

(6) Subject to the provisions of sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

[21] It should be noted that in sub-s (1) of s 6 where actions on contract, tort, actions to enforce recognisance, actions to enforce an award, actions for an account which are limited to six years, the provisions are silent regarding

limitation period for claiming of interest. However, in sub-s (3) which concerns 'an action upon any judgment' and for which the limitation period is 12 years, the claim for interest in respect of such judgment debt is limited to six years. In other words, in all cases the claim for arrears of interest is six years. In cases other than an action upon a judgment, no specific provision need be made as the action itself must be brought within six years.

[22] For the same reason, in s 20, which concerns actions to recover rent and for which the limitation period is six years, there is no mention about the limitation period for claiming interest.

[23] Section 21 concerns actions to recover any principle sum of money secured by a mortgage or charge. The limitation period is twelve years. This is followed by sub-s (5) that limits an action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge to six years. In other words in s 21 we have a somewhat similar situation as in s 6(3).

[24] All these sections talk about 'actions', all types of 'actions' as specified in the respective sections and the word 'action' itself is defined in s 2 to include 'a suit or any other proceeding in a court of law'.

[25] In my humble opinion, if we stick to the definition of the word 'action' as provided in the Act, the answer is easier to find and is clearer. All that we need to answer is first, whether a bankruptcy proceeding is 'a suit' or a 'proceeding in court' or neither. Unfortunately, confusion has arisen due to reliance on judgments, especially from other jurisdictions, where passages from those judgments are quoted without paying particular attention to the facts of the case and the law applicable in those cases.

[26] Be that as it may, let us look at the cases.

[27] I shall begin with the case of *WT Lamb & Sons v Rider* [1948] 2 KB 331.

[28] This is not a bankruptcy case. It is a summons in chambers in the main writ action in which judgment had been obtained but the judgment sum had not been satisfied. In the summons in chambers, the plaintiff applied for leave to proceed to execution to enforce the judgment notwithstanding that six years had elapsed since the judgment was entered. The application was made pursuant to Rules of the Supreme Court O 42 r 23(a) (Eng) which provides that where six years have elapsed since the date of the judgment, the party alleging himself to be entitled to execution may apply to court or a judge for leave to levy execution. The argument put forward was that RSC O 42 r 23(a) was invalid as it was in conflict with s 2(4) of the (English) Limitation Act 1939.

[29] It should be noted that first, the provisions of RSC O 42 r 23(a) is similar to the provisions of our O 46 r 2(1) RHC.

[30] The Court of Appeal (England) rejected that argument. The court held that RSC O 42 r 23(a) was not rendered invalid by the provisions of s 2(4) of the (English) Limitation Act 1939. The court drew a distinction between 'execution' in RSC O 42 r 23(a) and the word 'action' in s 2(4) of

the Limitation Act 1939. The court held that O 42 r 23(a) dealt solely with execution which is essentially a matter of procedure for the purpose of enforcing a judgment when obtained. On the other hand, s 2(4) of the Limitation Act 1939 is concerned with the right to sue on a judgment. A plaintiff who has obtained a judgment more than six years is not entitled to issue execution on it except with the leave of the court or a judge as provided by O 42 r 23(a) (of the English rules).

[31] It is this last sentence above that the case is an authority for. Furthermore, if we bear in mind that the words used in our O 46 r 2 RHC and in the English Rules are 'A writ of execution to enforce a judgment ...', clearly a bankruptcy notice or a bankruptcy petition cannot be 'a writ of execution'. So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 RHC. But, that does not answer the question posed to this court especially in view of the words 'or any other proceeding in court'. I shall come back to this later.

[32] We now come to *Lowsley and another v Forbes (t/a LE Design Services)* [1998] 3 WLR 501. First, it must be noted that, by the time *Lowsley* was decided the provisions of s 2(4) of the (English) Limitation Act 1939 had been replaced by s 24 of the (English) Limitation Act 1980, which provides:

(1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.

(2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[33] Note that besides splitting the old sub-s 2(4) of the 1939 Act into two subsections, the word 'twelve' in the first limb of the 1939 Act is substituted with the word 'six'.

[34] *Lowsley* too was not a bankruptcy proceeding. It was an application to enforce a judgment obtained 1½ years earlier by way of charging garnishee orders. The argument was that execution of the judgment was time barred by s 24(1) of the (English) Limitation Act 1980.

[35] The first issue, as stated by Lord Lloyd of Berwick was 'whether s 24(1) bars *execution* of a judgment after six years, or whether it only *bars the bringing of a fresh action* on the judgment'. (Emphasis added.)

[36] In his judgment, Lord Lloyd of Berwick, referring to the provisions of s 2(4) of the (English) Limitation Act 1939 held:

> Thus the position after the Limitation Act 1939 came into force was that a judgment debt became statute barred after 12 years.

[37] His Lordship agreed with *WT Lamb* that RSC O 42 r 23(a) was not ultra vires.

[38] On the first question mentioned above, his Lordship held:

> 'Action' in s 24(1) means a fresh action, and does not include proceedings by way of execution.

[39] In this respect, the headnote in [1998] 3 All ER 897 is preferable because it is very clear. This is what it ways:

> Held — On its true construction, the word 'action' in s 24(1) of the 1980 Act meant a fresh action, and did not include proceedings by way of execution. Accordingly, the section did not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment.

[40] However, on the second question that involves the interpretation of sub-s (2) of s 24 of the (English) Limitation Act 1980, the House of Lords held:

> However, there was no reason why the words 'no arrears of interest ... shall be recovered' in s 24(2) should not be given their ordinary meaning so as to bar execution after six years in respect of all judgments, since 'recovered' had a broad meaning and was not confined to recovery by fresh action. It followed that the judge had been correct to reduce the interest to six years, and to that extent the appeal would be allowed.

[41] So, the net effects of that judgment are:

(1) Action upon judgment must be brought within six years.

(2) Execution of judgment is not subject to a limitation period. However, leave must be obtained if the execution is to be done after the period of six years.

(3) However, even if it is by way of execution of a judgment, interest may only be recovered for a period of six years.

[42] We shall now come to the judgment of this court in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385. This is a bankruptcy case. In that case, the appellant obtained a summary judgment on 15 October 1987 with interest from 1 April 1986 until full realisation. On 24 January 1996 (eight years and three months later) the appellant filed a bankruptcy notice. However, the claim for interest was only for six years from the date of the judgment. This court held:

(1) When an act of recovery is made, future interest could not be said to be in arrears and, therefore, could not be claimed (see p 397 D).

(2) The second limb of s 6(3) of the Act provided that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it could not denote interest which was still not due. It must, therefore, mean arrears of interest at the time of recovery and could not include future interest even if the amount due had not been paid (see p 397D-E; *Lowsley & Anor v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 followed.

(3) Therefore, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date would only be entitled to that amount and nothing more. If he filed it on the first day after the six year period, his action would be barred by limitation, arrears of interest included (see p 397F)

(4) In the instant case, although the amount of arrears of interest claimed was only for six years from the judgment date, the bankruptcy notice had been

filed long after the limitation period of six years. Accordingly, the bankruptcy notice was rendered invalid. As for the prejudgment interest, despite the Court of Appeal's finding on this point, the court held that that was in order as it was merged with the principal amount from the date of the breach, and which was the standard stipulation in all contracts, to become the judgment debt (see p 397F–G).

(5) In view of the wording of the second limb of s 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. There was no formal defect or any irregularity in the instant case and s 131 of the Bankruptcy Act 1967 was certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time (see p 398F-H).

(6) The court was aware of O 42 r 12 of the Rules of the High Court 1980 ('the RHC'), which provided that every judgment debt shall carry an interest from the date of judgment until the judgment was satisfied. These rules were made by virtue of s 17 of the Courts of Judicature Act 1964 ('the CJA'). The words 'until the judgment is satisfied' in O 42 r 12 appear to be in conflict with the second limb of s 6(3) of the Act. However, between subsidiary legislation made under the CJA, namely the RHC, if it conflicted with s 6(3) of the Act, which was a parent law, then the Act prevailed in view of s 23 of the Interpretation Acts 1948 and 1967 (see p 398A-D).

[43] Learned counsel for the appellant submitted that this court in that case did not consider the question now posed to this court and under present discussion. He submitted:

> In the *Ernest Cheong* case, after holding that an action for recovery of arrears of interest after six years from the date of judgment is barred by the second limb of s 6(3) of the Limitation Act, the Federal Court did not apply its mind as to whether bankruptcy proceedings are within the ambit of the said provision of the Limitation Act (ie, the court did not consider whether bankruptcy proceedings is an 'action for recovery of arrears of interest'). The court had applied the said provision as a matter of course to determine the validity of the bankruptcy notice under consideration. The authority is therefore of no relevance here.

[44] [It must be pointed out that leave to appeal in the instant appeal was given prior to the decision of this court in *Ernest Cheong*].

[45] Whereas I would not agree that that case (*Ernest Cheong*) is of no relevance to the instant appeal, I agree that the issue now posed to this court was not discussed but rather it was assumed that s 6(3) applies. So, the question is still open for this court to decide.

[46] Recently, on 1 April 2004, this court delivered its decision in *Moscow Narodny Bank Ltd v Ngan Ching Wen* Federal Court Civil Appeal No 13–1 of 2003(W). The issue posed involving s 6(3) of the Limitation Act 1953 was whether the date when interest became due under a judgment was to be taken as the date of judgment or the date of commencement of interest as stipulated in the judgment.

[47] This question had in fact been answered in *Ernest Cheong* and this court followed its earlier decision in *Ernest Cheong*. Like in *Ernest Cheong*, the court also did not consider the issue now posed to this court in the instant appeal.

[48] Coming back to the issue now before this court. In my view, the answer lies in the answers to the following questions:

(1) whether a bankruptcy proceeding is an 'action' within the meaning of s 6(3) of the Limitation Act 1953 as defined in s 2 of the same Act;

(2) whether the 'two limbs' of s 6(3) should be read disjunctively or conjuntively.

[49] We have seen from the decided cases and I agree that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O 46 r 2 RHC. But, that does not necessarily mean that it is therefore 'an action' within the meaning of s 6(3). We still have to consider the meaning of 'an action upon any judgment' in the light of the definition given in s 2 of the Limitation Act 1953 that includes 'a suit or any other proceeding'.

[50] Of course, by merely looking at the word 'action' in s 6(3) it appears that the word 'action' does not include a bankruptcy proceeding. It is also clearly not a 'suit', one of the words used in the definition of the word 'action' in s 2. But, is it not a 'proceeding in a court of law' 'upon any judgment' (I am reading the provisions in ss 2 and 6(3) together).

[51] I do not think that it can be argued that a bankruptcy proceeding is not proceeding in court. Neither can it be argued that it is not based upon a judgment. There has to be a judgment before a bankruptcy proceeding can be commenced. Then going by the definition of 'action' in s 2, it is an 'action' and an action upon a judgment.

[52] A question then may be asked: on the same reasoning, is an 'execution' not a 'proceeding in court'? Of course it is a proceeding in court but, I think, the distinction lies in the fact that execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC. On the other hand, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the Official Assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the Official Assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceeding. Section 6(3) itself is about 'action upon a judgment'. Though the existence or non-existence of a cause of action may or may not be a factor to be considered, if we say that for there to be action there must be a cause of action, then the existence of a judgment and the failure to satisfy the judgment debt itself is a cause of action. In any event, it is a remedy provided by law, whether it is to be considered as a cause of action or not, if relevant. Furthermore, a bankruptcy proceeding is by way of petition, just like divorce, winding-up or election, to name a few. Thus a bankruptcy proceeding bears the characteristics of a fresh proceeding unlike an execution proceeding.

[53] On these grounds, I am inclined to the view that a bankruptcy proceeding, by definition of the word 'action' in s 2 of the Act is an 'action' and it is caught by the provisions of s 6(3).

[54] The next question then is whether the so-called first and second limbs of s 6(3) should be read conjunctively or disjunctively. A

[55] It may be argued that *Lowsley* is an authority for reading the two subsections (in the English provision) disjunctively on the ground that, even though the House of Lords held that sub-s (1) does not apply to executions, yet, even in execution proceedings the claim for interest is limited to six years. B But, what is important to note is that the provision of s 24 of the (English) Limitation Act 1980 under consideration in that case is differently arranged from the Malaysian provision in s 6(3). The provision in the (English) 1980 Act is split into two subsections. On the other hand the Malaysian provision is a one sentence subsection, like the provision in the (English) 1939 Act which was considered in *WT Lamb*. Could it be that the provision was C redrafted as a consequence of the decision in *WT Lamb* ?

[56] In any event, as I have said, s 6(3) is but a one sentence subsection. It is really quite misleading to refer to it as 'first limb' and 'second limb' giving the impression that they are to be read separately. Whatever the view of the House of Lords in England, that view is based on a differently arranged D provision: there are two separate subsections in the (English) 1980 Act as against a one sentence subsection in our law.

[57] Furthermore, we should look at the scheme of our Limitation Act 1953. Where, as has been pointed out, the limitation of action is six years, the provision is silent on the limitation period for claiming arrears of interest. E The reason is clear: it is not necessary because it is automatically limited to six years. Where the limitation of action is 12 years as in s 21 (and s 6(3)), the limitation period for claiming arrears of interest is six years. (See *Ernest Cheong* for meaning of 'arrears of interest'). So, the limitation period for claiming arrears of interest is consistent ie six years in all cases. The exception is execution proceedings. But, first of all, it is 'execution' not an 'action'. F Secondly, if execution is to be done after six years leave of court must be obtained. That, perhaps, is the reason for the requirement of leave, leave may not be granted at all or it may be granted with condition attached, eg the arrears of interest may be limited to six years also. On these grounds I am of the view that the whole subsection should be read together and not to be split to first and second limbs and to read them disjunctively. G

[58] In conclusion, it is my considered opinion that a bankruptcy proceeding is an 'action upon (a) judgment' within the meaning of s 6(3). The limitation for bringing the action is 12 years but the arrears of interest may only be claimed for six years.

H

[59] I am aware that this conclusion may be inconsistent with *Ernest Cheong* in one aspect ie where Abdul Malek Ahmad FCJ, delivering the judgment of the court said at pp 397 and 398:

> In the instant case, although the amount of arrears of interest claimed is only for six years from the judgment date, the bankruptcy notice had been file on 24 January 1996, long after the limitation period of six years which expired on 14 October 1993. I Accordingly, the bankruptcy notice is rendered invalid. As for the prejudgment interest, despite the Court of Appeal's finding on this point, we hold that that is in

order as it is merged with the principal amount from the date of the breach, and which is the standard stipulation in all contracts, to become the judgment debt.

...

To answer the question posed, we would recapitulate by saying that in view of the wording of the second limb of s 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. In our view, there is no formal defect or any irregularity in the instant case and s 131 of the Bankruptcy Act is certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time.

[60] With greatest respect, as I have held that the whole of s 6(3) should be read conjunctively, s 6(3) allows an action upon judgment to be brought within 12 years but in such an action arrears of interest may only be claimed for a period of six years. The position is somewhat similar to s 21 where an action to recover the principal sum of money secured by a mortgage may be brought within 12 years but an action to recover arrears of interest payable in respect of the same is limited to six years. It is true that the provisions in s 21 are to be found in two different subsections but the principle is the same. The fact that the word 'action' is not repeated because the so-called second limb is part of the same sentence constituting the subsection which begins with the words 'An action'. The whole subsection is about an action upon a judgment.

[61] In the circumstances I would answer the first question posed to this court in the affirmative ie s 6(3) applies to bankruptcy proceedings and while a bankruptcy proceeding may be brought within 12 years of the date of judgment, arrears of interest may only be claimed for a period of six years from the date of the judgment.

[62] In this case, judgment was obtained on 23 October 1987. Even though interest was calculated from 1 December 1985, following *Ernest Cheong* it merges into the judgment debt and therefore the date the interest became due, is the date of the judgment, not the earlier date. Bankruptcy notice was filed on 28 March 1996, eight years and five months from the date of judgment which is within the 12 year period. So the filing of the bankruptcy notice is not out of time.

[63] What about the interest claimed?

[64] I have reproduced the relevant part of the learned judge's judgment earlier.

[65] A few things need be said about this part of the judgment. First, the learned judge took the date from which the interest was calculated (1 December 1985) and not the date of judgment (23 October 1987) as the date the interest became due. In view of the judgment of this court in *Ernest Cheong* which was followed by this court in *Moscow Narodny Bank Ltd*, with respect, that is not correct. Those cases held, and I agree, that regarding interest before judgment, the date the interest became due is the date of judgment. The interest merged with the judgment sum.

[66] Secondly, the learned judge calculated the period of limitation from the date the interest was calculated in the judgment (1 December 1985) to the date of judgment (23 October 1987). In view of the two judgments of this court just mentioned, with respect, that too is not correct. As decided in *Ernest Cheong*, the period is to be calculated from the date of judgment to the date of filing the bankruptcy notice (eight years and five months after date of judgment). As I have held, contrary to *Ernest Cheong*, that s 6(3) allows it to be filed within a period of 12 years, so, the filing of the bankruptcy notice was within the limitation period. But, what about the arrears of interest claimed? Again, with respect, I am of the view that the learned judge was wrong when he said that the Act does not prohibit the claim for arrears of interest beyond six years. Both in *Ernest Cheong* and *Moscow Narodny Bank Bhd* it was held and it is also my view (even though for different reasons) that in a bankruptcy proceeding arrears of interest may only be claimed for a period of six years from the date of judgment.

[67] The Court of Appeal in this appeal said at p 217:

> We are not sure whether the bankruptcy notice included a claim of interest exceeding the limitation period. It is so then the bankruptcy notice is void.

[68] Whether interest was claimed in excess of six years or not can be ascertained from the particulars provided in the bankruptcy notice:

PARTICULARS OF CLAIM

As per judgment dated 23rd day of October 1987

1.	Judgment sum	RM2,963,054.86
2.	Interest at the rate of 16.5%pa from 1 February 1986 to 28 March 1996 (3,771 days)	RM5,051,115.56
		RM8,014,170.42

[69] The date of judgment is 23 October 1987. Interest may only be claimed for a period of six years from the date of judgment, ie until and including 22October 1993. But the claim was made until 28 March 1996 (the date the bankruptcy notice was filed) which is clearly more than six years. So, the arrears of interest claimed contains arrears of interest outside the period of six years allowed ie two years and five months more than allowed. That, following *Ernest Cheong* renders the bankruptcy notice invalid.

Second Question

[70] The issue in the second question was never raised in the High Court. Thus, understandably, the learned judge did not deal with it.

[71] In the Court of Appeal, from the judgment, it appears that learned counsel for the appellant raised an objection 'on the way' the respondent raised the issue on interest (the second issue in the High Court and the Court of Appeal and the first question in this court). Her objection was on the ground

that no notice was given within seven days of service of the bankruptcy notice as required by s 3(2) proviso (ii) of the Bankruptcy Act 1967. The issue regarding interest (first question in this court) was only raised as a preliminary objection about 11 months after the service of the bankruptcy notice. The Court of Appeal, in its judgment states that from the record it was clear that learned counsel for the appellant did not object to the issue on interest being raised before the learned trial judge. The learned judge went on to hear the arguments and made his ruling. The Court of Appeal held that it was too late for the appellant to raise the objection before it. The Court of Appeal went on to say that it was a point of law which in its opinion could be raised at any time. And, the whole judgment of the Court of Appeal is on the issue of interest just like judgment of the High Court.

[72] This court on 17 September 2001 granted leave not only on the issue of interest (the first question here) but also on the second question regarding the failure to give notice under s 3(2) proviso (ii). This becomes the second question now.

[73] I must admit that I am in a dilemma. On the one hand, the issue was not raised in and therefore not considered by the High Court, though attempted to be raised by way of a preliminary objection in the Court of Appeal it was dismissed by the Court of Appeal as being too late to do so. The merit of the issue was not considered both by the High Court and the Court of Appeal. On the other hand, leave was granted by this court on that issue.

[74] Should we answer the question? In fact the more pertinent question is whether should leave have been granted at all? I should not and I do not question the wisdom of this court in granting leave on the second question. However, as Abdul Malek Ahmad FCJ has very openly and honestly pointed out in *Moscow Narodny Bank Ltd* that, in that case, where he himself was a member of the panel that granted leave, 'upon full analysis at the hearing' he realised that may be the question should not have been allowed at all. That is why sometimes this court, after hearing the appeal, declines to answer certain questions.

[75] In this present appeal, personally speaking, I am very reluctant to answer the question. First, we do not have the advantage of having the judgments of the High Court and the Court of Appeal on the issue.

[76] Secondly, it is unfair to the appellant that a point that was neither raised nor argued in the High Court and not allowed to be raised by the Court of Appeal and therefore not argued before it be argued for the first time in this court.

[77] Thirdly, it will encourage parties to raise new issues as a case progresses, especially when a new counsel comes into picture.

[78] Fourthly, not only was there no objection raised on that ground in the High Court, but the preliminary objection by the respondent regarding interest was argued in full and that, in fact, was the only issue argued before the High Court and decided by the learned judge and that also was the only issue decided upon by the Court of Appeal.

[79] Fifthly, the objection regarding the failure to give notice is procedural in nature, compared to the objection regarding interest by the respondent, which actually involves interest that cannot be lawfully claimed as provided by law. (I am not saying that failure to give notice under s 3(2) proviso (ii) of the Bankruptcy Act 1967 does not invalidate the bankruptcy notice in all cases. All I say is that the issue must properly taken at the right time.)

[80] Sixthly, if I may venture a bit into the law without actually deciding it, s 3(2) of the Bankruptcy Act 1967 talks about 'the amount due exceeds the amount actually due', which may be due to wrong calculation or failure to take into account amounts paid subsequent to the judgment. In this case it is the claim for arrears of interest which the law does not permit. No wonder the Court of Appeal says that 'this is a point of law which in our opinion could be raised at any time'. (The court was referring to the respondent's objection on the inclusion of arrears of interest exceeding six years).

[81] In the circumstances, I would decline from answering the second question.

[82] I would dismiss the appeal with costs and order that the deposit be paid to the respondent on account of taxed costs.

[83] My CJ (Sabah and Sarawak) and my brother Mohd Noor Ahmad FCJ have read this judgment in draft and agreed with it.

Appeal dismissed.

Reported by Lim Lee Na